Constitutional War Powers:The Functional Relevance Of The War Powers Debate

CSC 2005

Subject Area Strategic Issues

TITLE:

CONSTITUTIONAL WAR POWERS:
THE FUNCTIONAL RELEVANCE OF THE WAR POWERS DEBATE

SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF MILITARY STUDIES

AUTHOR:

MAJOR CARL E. COOPER, JR., USMC

AY 04-05

Report Documentation Page

Form Approved
OMB No. 0704-0188

1. REPORT DATE	2. REPORT TYPE	3. DATES COVERED
2005		**00-00-2005 to 00-00-2005**

4. TITLE AND SUBTITLE	5a. CONTRACT NUMBER
Constitutional War Powers:The Functional Relevance Of The War Powers Debate	5b. GRANT NUMBER
	5c. PROGRAM ELEMENT NUMBER
6. AUTHOR(S)	5d. PROJECT NUMBER
	5e. TASK NUMBER
	5f. WORK UNIT NUMBER
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) **United States Marine Corps,Command and Staff College, Marine Corps University,2076 South Street, Marine Corps Combat Development Command,Quantico,VA,22134-5068**	8. PERFORMING ORGANIZATION REPORT NUMBER
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)	10. SPONSOR/MONITOR'S ACRONYM(S)
	11. SPONSOR/MONITOR'S REPORT NUMBER(S)

12. DISTRIBUTION/AVAILABILITY STATEMENT
Approved for public release; distribution unlimited

13. SUPPLEMENTARY NOTES

14. ABSTRACT

15. SUBJECT TERMS

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT **unclassified**	b. ABSTRACT **unclassified**	c. THIS PAGE **unclassified**	**Same as Report (SAR)**	**51**	

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Acknowledgments

I thank Dr. Jack Matthews for generating my initial interest in this subject and for providing primary guidance and direction for my research. I also thank former Secretary of the Navy John Lehman and Louis Fisher, whose works referenced in the bibliography significantly helped frame the research for this project. Most importantly, I recognize and thank Dr. Richard DiNardo and Colonel Ritch Rodebaugh, USMC for their patient mentoring and critical assistance that turned research into writing.

Executive Summary

Subject: Constitutional War Powers: The Functional Relevance Of The War Powers Debate

Thesis: The residence of Constitutional war powers has been defined by the functional execution of war powers, which has been almost entirely that of the executive, not by the interpretation of the original intent of the Framers of the Constitution.

Background: The debate on where the Constitutional authority to make war resides has revolved around three distinct interpretations of the Framers' original intent: the supremacy of the executive, the supremacy of the legislature, and the collective judgment of both in making war.

Discussion: The conclusion of World War II marked the last time that Congress formalized a relationship of hostility through a declaration of war. Since then, the introduction of United States Armed Forces into hostilities has been done so entirely on the prerogatives of the executive.

- Every post-World War II President has entered United States Armed Forces into hostilities, often absent of Congressional participation and occasionally in direct contravention to Congressional desire.
- Each of these introductions of United States Armed Forces into hostilities furthered the war powers debate, which evolved to include the implication of United States participation in mutual security arrangements, such as the United Nations and the North Atlantic Treaty Organization, and the success and resultant popularity of the military action in question.
- In an effort to protect its participation in war making decisions, Congress enacted legislation, first in the form of amendments to appropriations bills and later with the War Powers Act of 1973. This legislation, though, impacted little the functional supremacy of executive war powers.

Conclusion: Each time that United States Armed Forces were introduced into hostilities following World War II, whether it was with Congress' tacit approval, in direct contravention to it or exclusive of its full knowledge, the Presidents all maintained their executive prerogative. As such, they defined through function that the decision to introduce United States Armed Forces into hostilities rests solely with the President, regardless of individual interpretations of the Framers' original intent.

Introduction

The debate on where the Constitutional authority to make war resides is older than the Constitution itself. Originating at the Federal Convention of 1787, it has endured into the 21st Century. This debate has revolved around three distinct interpretations of the Framers' original intent: the supremacy of the executive, the supremacy of the legislature, and the collective judgment of both in making war. It matters not what that original intent was, however, because the residence and exercise of war powers have not been defined by this debate. Rather, the residence and exercise of war powers have been defined by its functional execution, which has been almost entirely that of the executive. This has been particularly the case since the conclusion of World War II, which was the last time that Congress formalized a relationship of hostility through a declaration of war. Since then, as illustrated by the actions of every subsequent President, the introduction of United States Armed Forces into hostilities has been done so entirely on the prerogatives of the executive.

This paper will analyze, through selected United States involvements in post-World War II military action how the authority of the executive has prevailed. Specifically, it will examine how each post-World War II President has entered United States Armed Forces into hostilities based solely on his

appreciation of the requirement and foreign policy objectives, often absent of Congressional participation and occasionally in direct contravention to Congressional desire.

Origins of the War Powers Debate

Within the broader context of allocation of power, the Framers of the Constitution addressed the issue of what would become known as war powers. Available historical precedent, beyond that exemplified by the hereditary monarchy of England, was largely that provided by John Locke. In his work, The Second Treatise of Government, Locke presented his three powers of the commonwealth: the legislative, the executive and the federative.[1] Of significance to the war powers debate is the defined power of the federative. Per Locke, this power contained that of "war and peace, leagues and alliances, and all transactions, with all persons and communities outside the commonwealth."[2] Essentially, Locke was describing what, in modern parlance, is the conduct of foreign relations. Locke, acknowledging that the powers of the executive and federative were clearly distinct, cautioned that they should not be separated or "placed at the same time, in the hands of distinct persons..."[3] Locke justified this with the reasoning that separation of the executive and federative would be tantamount to simultaneously placing the force of the public under

[1] John Locke, The Second Treatise of Government, ed. Thomas P. Peardon (New York: The Liberal Arts Press, 1952), secs. 143-145.

[2] Locke, sec. 146.

[3] Locke, sec. 148.

different commands, which "would be apt some time or other to cause disorder and ruin."[4]

The resulting language of the Constitution established that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States."[5] It granted in the Congress the power "to declare war."[6] In this clause the term "declare" was originally penned as "make." Its change was the result of objection by two delegates from South Carolina, Charles Pinckney and Pierce Butler. Mr. Pinckney believed the legislature too slow for vesting in which the power to make war. Mr. Butler supported vesting the power in the President, "who will have all the requisite qualities, and will not make war but when the Nation will support it."[7] On amendment introduced by James Madison (Virginia) and Elbridge Gerry (Massachusetts), "make" was stricken and "declare" inserted, "leaving to the Executive the power to repel sudden attacks."[8] This distribution of power,

[4] Locke, sec. 148.

[5] U.S. Constitution, Art. II, sec. 2.

[6] U.S. Constitution, Art. I, sec. 8.

[7] Max Farrand, ed., The Records of the Federal Convention of 1787, (New Haven, CT: Yale University Press, 1911), 318.

[8] Farrand, 318.

commander in chief versus war declaration, is, in whole part, the war powers debate.

The significance with which the Framers held the responsibility of providing for the common defense was articulated by Alexander Hamilton (New York):

> These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.[9]

As such, the authors of The Federalist took great effort in communicating the nuances of these powers in their campaign for ratification of the Constitution.

Nevertheless, their writing alone does not provide a clear vision of the Framers' original intent. For example, Hamilton offered that the authorities as commander in chief "amount to nothing more than the supreme command and direction of the military and naval forces...," while the legislature retains the authority to declare war as well as the authority to raise and regulate fleets and armies.[10] From this it is logical to draw that the decision to enter into hostilities rests with Congress, while the prosecution of those hostilities resides with the President.

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[9] Alexander Hamilton, James Madison and John Jay, The Federalist, Edited by Benjamin Fletcher Wright, (Cambridge, MA: The Belknap Press of Harvard University, 1961), No. 23, 200.

[10] Hamilton, et al., The Federalist, No. 69, 446.

Seemingly contrary to this, though, Hamilton offered the necessity for a "vigorous" executive whose energy is "essential to the protection of the community against foreign attacks."[11] Further, he added that:

> Of all cares or concerns of the government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.[12]

In the above, then, is "direction" to be interpreted as the authority to decide to enter into hostilities? With this interpretation the war powers of Congress would be limited to that of formalizing the hostile relationship with another nation through the declaration of war, seemingly after the Presidential decision to enter into hostilities. This, too, is logical because this is essentially the mechanism established in the Constitution for making treaties. Or, does "direction" connote the local operational control of the armed forces after they have been provided to the executive for a specified use? These varying interpretations all pivot on who, the President or Congress, retains the decision-making authority to enter into hostilities.

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[11] Hamilton, et al., The Federalist, No. 70, 451.

[12] Hamilton, et al., The Federalist, No. 74, 473.

The Framers' desire for substantive, effective checks and balances of the separated powers of the three branches of government is well established. With this as the basis of reasoning, it is quite possible that in granting authority to Congress to raise armies and maintain a navy, they, through the Constitution, granted Congress the ability to influence the federative power of the President. By regulating the size and strength of the armed forces, Congress could regulate the scale and scope of the President's foreign policy. Conversely, in making the President the Commander in Chief, the Constitution was maintaining his authority to conduct foreign relations within the capabilities provided in, among others things, the armed forces. Hamilton alludes to this while making the argument for limiting the funding to support a standing army to an appropriation term of no longer than two years, which the Constitution does stipulate in Article I, Section 8:

> [The legislature] is not at liberty to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence.[13]

With this funding arrangement, the Constitution ensures the participation and cyclical validation by the people of the President's ability to conduct foreign relations with or through the armed forces, because this appropriation term aligns with

[13] Hamilton, et al., The Federalist, No. 26, 216.

that of the election cycle in the House of Representatives, as stipulated in Article I, Section 2.

As the debate over the distribution of war powers endured, another idea surfaced that extended beyond the model of checks and balances. This was the idea of collective judgment, which became most popular in the latter half of the 20th Century. Simply put, this idea centered on the notion that war powers were not distributed *between* the executive and legislative branches, but rather *among* them. Although certainly not an illogical idea, it is not supported by the record of the Federal Convention, the final text of the Constitution or the feelings of those who crafted it. As warned by James Madison:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many... may justly be pronounced the very definition of tyranny.[14]

Madison reinforced this by referencing the newly-formed state constitution of New Hampshire:

> The legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other as the nature of a free government will admit.[15]

It would appear, then, that the concept of separated powers is not consistent with that of collective or shared powers. Nevertheless, this idea, as well as the others, would resurface

[14] Hamilton, et al., The Federalist, No. 47, 336.

[15] Hamilton, et al., The Federalist, No. 47, 339.

in post-World war II America as the functional relevance of the war powers would be continually debated.

Post-World War II and the War Powers Act of 1973

After the invasion of South Korea by North Korea in June 1950, President Truman committed, without the consent or approval of Congress, United States Armed Forces to assist in repelling this attack. President Truman's justification was founded on the United Nations Participation Act of 1945, which codified the United States' role within the United Nations. Specifically, President Truman acted under the authority of a 27 June 1950 United Nations Security Council resolution that declared the North Korean attack on South Korea "a breach of the peace" and recommended that its members "furnish such assistance... as may be necessary to repel the armed attack and to restore international peace and security in the area."[16] Essentially, President Truman held that the United Nations Participation Act already provided the legal authority, pursuant to a United Nations Security Council resolution, for him to act.

President Truman's actions fell under immediate scrutiny and opened a new chapter in the war powers debate: what effect has United States membership in the United Nations and other mutual security organizations on Constitutional war powers? Congressman Vito Marcantonio (American Labor Party-New York)

[16] United Nations, Resolution Concerning the Complaint of Aggression upon the Republic of Korea Adopted at the 474th Meeting of the Security Council on 27 June 1950, <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/064/96/IMG/NR006496.pdf?OpenElement> (29 December 2004).

argued that, "When we agreed to the United Nations Charter we never agreed to supplant our Constitution..."[17] Senator Robert Taft (Republican-Ohio) acknowledging the implications of United Nations membership held, "I do not think it justifies the President's present action without approval of congress."[18] On the other side of the argument, noted historian Henry Commager supported the President. Dr. Commager's position, at that time, was, "When Congress passed the United Nations Participation Act it made the obligations of the Charter of the United Nations law, binding on the President."[19]

To understand the core of this facet of the debate, one must review the requirements of the United Nations Charter. Chapter 7 of the Charter, "Action With Respect To Threats To The Peace, Breaches Of The Peace, And Acts Of Aggression," outlines United Nations Security Council responsibilities regarding such actions the peace. Specifically, Article 41 authorizes the Security Council to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions." Article 42 authorizes the Security Council, upon considering that measures undertaken under Article 41 have proven inadequate, to "take such action by air, sea, or land

[17] Louis Fisher, Presidential War Power, (Lawrence, KS: University Press of Kansas, 1995), 88.

[18] Fisher, 88.

[19] Fisher, 89.

forces as may be necessary to maintain or restore international peace and security." When authorized by Article 42, Article 43 stipulates that:

> All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.[20]

Noted constitutional scholar Louis Fisher provides retrospective analysis in Presidential War Power, and argues that President Truman acted in contravention to the United Nations Participation Act. Mr. Fisher contends that Section 6 of the United Nations Participation Act requires the Congress to approve any special agreement referenced in Article 43.[21] The text of the Act supports Mr. Fisher's argument:

> The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution...[22]

Thus, Presidents could commit armed forces to the United Nations only after Congressional authority.[23]

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[20] United Nations, Charter of the United Nations, 26 June 1945, <http://www.un.org/ aboutun/charter/> (30 December 04) (emphasis added).

[21] Fisher, 80.

[22] The United Nations Participation Act of 1945, 59 stat. 621.

[23] Fisher, 80-81.

President Truman provided another opportunity to further this debate in 1951 when he announced that he would send United States military forces to Europe in support of the North Atlantic Treaty Organization (NATO). The North Atlantic Treaty, ratified by the United States in 1949, entered the United States into a mutual security pact with the other North Atlantic nations. In particular, Article 5 of the Treaty states:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.[24]

During the ratification process, Congressional debate became centered on this Article and the possibility that it provided the opportunity for usurpation of Constitutional process and erosion of Congressional war power.[25] Congress considered legislation, introduced by Senator Arthur Watkins (Republican-Utah), which would require explicit Congressional approval before the President could commit armed forces to NATO. [26] This

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[24] North Atlantic Treaty Organization, North Atlantic Treaty, 4 April 1949, <http://www.nato.int/docu/basictxt/treaty.htm> (31 December 2004).

[25] Jacob K. Javits, Senator, Who Makes War: The President Versus Congress, (New York: William Morrow and Company, Inc., 1973), 242.

[26] Fisher, 96.

legislation, however, was rejected and the treaty passed by an overwhelming 82 for to 13 against. President Truman's announcement, then, in January 1951, combined with his public comment that he did not require Congressional approval before deploying United States Armed Forces abroad sparked a public debate between the President and members of Congress. In response to a speech by Senator Tom Connally (Democrat-Texas), in which the Senator stated that the President would in the future consult Congress on Armed Force commitments, President Truman responded:

> Under the President's constitutional powers as Commander in Chief of the Armed Forces he has the authority to send troops anywhere in the world... This government will continue to live up to its obligations under the United Nations, and its other treaty obligations, and we will continue to send troops wherever it is necessary to uphold these obligations.[27]

Senator Taft, again expressing his concern over the undermining of Congressional war power, stated that it was "incumbent upon the Congress to assert clearly its own Constitutional powers unless it desires to lose them."[28] Senator Taft further stated, "This matter must be debated and determined by Congress and by the people of this country if we are to maintain any of our

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[27] Harry S. Truman, President of the United States, News Conference 250 at Indian Treaty Room, Executive Office Building, Washington D.C., 11 January 1951, <http://www.trumanlibrary.org/publicpapers/index.php?pid=206&st=&st1=> (30 December 2004).

[28] Fisher, 99.

constitutional freedoms."[29] However, despite the efforts and intentions of Senator Taft and others, this debate produced only a non-binding Senate resolution that, in addition to authorizing the four divisions to Europe, required that Congressional approval be obtained for further assignment of United States Armed Forces to NATO. In what would become a prophetic comment, Senator Connally summarized the results of this debate when he remarked that the President's authority to send United States Armed Forces "to any place required by the security interests of the United States has often been questioned, but never denied by authoritative opinion."[30]

The debate here had quickly evolved into one over ever-increasing Presidential authority and largely overshadowed that of the impact of mutual security arrangements. This was a missed opportunity as the impact of membership in mutual security arrangements would often present itself in the latter half of the 20th Century, each time evoking many of the same arguments prevalent during President Truman's administration. Nonetheless, President Truman's actions and Congress' inability to counter them laid the foundation for executive definition of the war powers.

The war powers debate continued when, in 1955, China initiated hostilities against Chiang Kai-shek and his forces on

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[29] Javits, 248.

[30] Javits, 249.

the islands around Formosa. Within the context of post-Korean War relations with China and the United States' enduring commitment to Chiang Kai-shek, President Eisenhower desired intervening action and asked Congress to pass a resolution that would authorize the use of United States Armed Forces to protect Formosa. On the surface, it appears that President Eisenhower, by first appealing to Congress, appreciated Constitutional war powers differently than did President Truman. Later statements made by President Eisenhower, though, reflect the two held very similar views and that the disparity was due more to President Eisenhower's astuteness as a politician. The President stated that when appealing to Congress, he "did not imply that [he] lacked constitutional authority to act," but rather desired Congressional resolution to illustrate "the unified and serious intentions" of the United States.[31] Congress granted President Eisenhower this authority in the Formosa Resolution, but tensions passed without the United States entering into hostilities.

With this precedent, President Eisenhower asked Congress in 1957 for authorization to act against Soviet influence and ambition in the Middle East. The prospect of United Nations Security Council action was unlikely due to an assumed veto by the Soviets, who had been conveniently absent in June 1950 during the Council's vote on action to counter the North Korean invasion. In

[31] Javits, 254.

his request President Eisenhower affirmed the need for "joint action of the President and the Congress."[32] Again, this statement should not be inferred as President Eisenhower's capitulation of executive war powers, but rather his astuteness and deep understanding of the sensitivities of the issue. When responding to then House Majority Leader John McCormack (Democrat-Massachusetts) on whether the President, as Command in Chief, already possessed the authority for actions in the Middle East, President Eisenhower stated that in theory he did, but "greater effect could be had from a consensus of Executive and Legislative opinion."[33] Support of this resolution was not as forthcoming as had been the Formosa Resolution. Issues of contention included the ambiguity of scale, scope and duration, and Congress's ability to affect those issues. During the Senate debate, Senator Wayne Morse (Democrat-Oregon) attempting to protect Congressional war powers offered an amendment requiring Presidential notification to Congress prior to the employment of United States Armed Forces. The proposed amendment, which was not supported by President

[32] Dwight D. Eisenhower, President of the United States, "Special Message to the Congress on the Situation in the Middle East," speech to Joint Session of Congress, U.S. Capitol, Washington D.C., 5 January 1957. < http://www.eisenhower.utexas.edu/midleast.htm> (30 December 2004).

[33] Gary M. Stern and Morton H. Halperin, ed, The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives, (Westport, CT: Greenwood Press, 1994), 23.

Eisenhower, eventually failed in the Senate. The text of the proposed amendment:

> Prior to the employment of armed forces the President shall give notice to Congress. If, in the judgment of the President, an emergency arises in which such notice to Congress is not possible, he shall, upon the employment of armed forces, forthwith inform Congress and submit his action for its approval or disapproval[34]

would, though, resurface a decade and a half later at the very height of the war powers debate. Eventually passed, the Middle East Resolution affirmed the United States' position that it regarded the integrity and independence of the nations of the Middle East as vital to its national interests. Under this authority, President Eisenhower committed United States Armed Forces to Lebanon in the summer of 1958.

President Kennedy, more similar to the actions of President Truman than that of President Eisenhower, upon avowing the United States' determination to protect itself against Soviet build-up in Cuba, stated at a news conference in September 1962, "[That] as President and Commander in Chief I have full authority now to take such action...."[35] In a follow-on question regarding this statement, President Kennedy was asked if he saw any value in a Congressional resolution granting him this

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[34] Fisher, 109.

[35] John F. Kennedy, President of the United States, News Conference 43 at State Department Auditorium, Washington, D.C., September 13, 1962, <http://www.jfklibrary.org/jfk_press_ conference_ 620913.html> (31 December 2004).

authority. President Kennedy responded, "No, I think the members of Congress, speaking as they do, with a particular responsibility, I think it would be useful if they desired to do so, for them to express their view."[36] Despite President Kennedy's statements, a joint resolution was passed that declared the United States' determination to prevent the communist regime in Cuba from endangering the security of the United States or extending its activities in the Western Hemisphere. The resolution stopped short, though, of authorizing presidential action. Nonetheless, President Kennedy imposed a naval blockade on Cuba. This crisis eventually found a diplomatic solution, but any perception of collaborative effort resulting from President Eisenhower's approach to executive-legislative war powers was effectively reversed.

On 2 and 4 August 1964, while on routine patrols in the South China Sea, two United States Navy ships were reportedly attacked by North Vietnam. From what became known as the Gulf of Tonkin Incident, the United States eventually entered into the most feverish period of the war powers debate. In what was termed Operation Plan 34-A, the United States provided assistance to the South Vietnamese in their conduct of naval special operations in the Gulf of Tonkin in response to North Vietnamese aggression. The facts of the Gulf of Tonkin

[36] Kennedy.

Incident, to include whether either or both of the attacks occurred, and the depths of United States participation in Operation Plan 34-A remains a source of contention over 40 years later.[37] At the time of the incident, however, it was generally accepted that a United States destroyer, the *USS Maddox*, was attacked by North Vietnamese patrol boats on 2 August 1964. This attack was followed two days later with another attack on two destroyers, the *Maddox* and the *USS C. Turner Joy*. In response to this incident, President Johnson asked Congress to pass a resolution "affirming the national determination that all such attacks will be met, and that the United States will continue in its basic policy of assisting the free nations of the area to defend their freedom."[38] With little debate and fueled by emotion, Congress overwhelmingly passed the Gulf of Tonkin Resolution on 7 August 1964. The House vote was unanimous; opposition in the Senate was limited to two dissenters.[39] The Resolution, referencing United States' obligations under the Charter of the United Nations and the

[37] For a recent analysis of the Gulf of Tonkin Incident, see: John Prados, Essay: 40th Anniversary of the Gulf of Tonkin Incident, The National Security Archive, 2004, 4 August 2004, <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB132/essay.htm> (31 December 2004).

[38] Lyndon B. Johnson, President of the United States, Message to Congress, Washington, D.C., 5 August 1964, <http://www.yale.edu/lawweb/avalon/tonkin-g.htm> (1 January 2005).

[39] Brian R. Dirck, Waging War on Trial: A Handbook with Cases, Laws, and Documents (Santa Barbara, CA: ABC-CLIO, Inc., 2003), 70.

Southeast Asia Collective Defense Treaty, authorized the President "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."[40]

Unlike the Formosa, Middle East and Cuba Resolutions, each granting somewhat similar authority to previous Presidents, hostilities were not avoided in Southeast Asia. The broad language of Gulf of Tonkin Resolution allowed the President wide authority, with which he used to greatly expand United States involvement in Vietnam. Senator Javits (Republican-New York), who voted for the resolution, later reflected that he believed the language of the resolution was broader than Congress's original intent:

> In voting unlimited Presidential power most members of Congress thought they were providing for retaliation for an attack on our forces; and preventing a large-scale war in Asia, rather than authorizing its inception.[41]

Although President Johnson had petitioned and received Congressional approval, and Congress continued its de-facto support through appropriation, the war powers debate resurfaced as the popularity of United States involvement in Southeast Asia declined.

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[40] U.S. Congress. Joint, Gulf of Tonkin Resolution, 88th Cong., 2nd sess., 1964, H.J. Res. 1145.

[41] Javits, 259.

In April 1970, President Nixon committed United States Armed Forces to Cambodia to destroy North Vietnamese forces operating from sanctuaries within its borders. President Nixon did not seek Congressional approval for this action because, in his view, he was only exercising his powers as Commander in Chief to counter enemy action that endangered the lives of Americans in Vietnam, not expanding the war.[42]

The political repercussions of President Nixon's actions were immediate, and Congressional debate began to reverse the seemingly limitless Presidential authority assumed by the Commander in Chief. Senators John Cooper (Republican-Kentucky) and Frank Church (Democrat-Idaho) introduced an amendment to limit the President's actions in Cambodia.

This amendment was eventually attached to a supplemental appropriations bill and barred funding for United States ground troops or advisors in Cambodia. At the timing of this legislation, the United States had no plans for further action in Cambodia, and President Nixon accepted the amendment.[43] This amendment set precedent as further restrictions were added to subsequent appropriations bills. More significant to the war powers debate, though, was the repeal of the Gulf of Tonkin

[42] John Lehman, Secretary of the Navy, Making War: The 200-Year-Old Battle Between the President and Congress over How America Goes to War, (New York: Charles Scribner's Sons, 1992), 85-86.

[43] Lehman, 88.

Resolution. With full consent of President Nixon, Senator Bob Dole (Republican-Kansas) introduced the successful repeal legislation. President Nixon supported the appeal because of his belief that the authority of Presidential war powers resided not in the resolution, but rather in the President's authority as Commander in Chief.[44]

The opposition to limitless executive authority born of this marks the origins of the War Powers Act. As articulated by Senator Javits, who collectively with other Senators introduced the legislation in the Senate in 1972 and 1973, "the bill [was] designed to make sure the democratic process protects us from one-man decision-making." Following significant debate Congress passed the joint resolution, and, vehemently opposed to the bill, President Nixon vetoed it. Congress overrode this veto, and on 7 November 1973, enacted The War Powers Act.

As stated in the Act, its purpose is to "insure the collective judgment of both the Congress and the President will apply to the introduction of United States Forces into hostilities..."[45] To accomplish this, Congress imposed through the legislation restrictions on when the President, as Commander in Chief, may introduce United States Armed Forces into hostilities. These included "a declaration of war, specific

[44] Lehman, 89.

[45] The War Powers Act of 1973, 50 U.S. Code § 1541 (2002).

statutory authorization, or a national emergency created by an attack upon the United States, its territories or possessions, or its armed force."[46] Of these occasions only the third authorized the President to act without prior Congressional approval, and then only in response to an attack. With language reminiscent of that introduced by Senator Morse several years earlier, the Act further required that the President consult with Congress "in every possible instance before introducing United States Armed Forces into hostilities" and set a 60-day time limit during which Congress must approve or disapprove the President's continuance of this introduction.[47]

The War Powers Act was to reset the issue of war powers back to "the intent of the framers of the Constitution" and reverse the post World-War II erosion of the Congressional prerogative in making war.[48] Some members of Congress had deduced the Nation's unpopular, protracted involvement in Vietnam as the result of the President's exclusion of Congress from war making decisions. As such, the War Powers Act was politicized as a tool to avoid the Nation in any similar involvements in the future. However, Senator Javits faulted not the President, but Congress for its participatory absence:

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[46] The War Powers Act of 1973.

[47] The War Powers Act of 1973.

[48] The War Powers Act of 1973.

> ...the power of decision that President Nixon exercised in Cambodia and through the very end of the Vietnam War had not been stolen. It had been surrendered. Congressional acquiescence was the result of a surge in American power that had charged the Presidency with an aura of international splendor.[49]

Senator Barry Goldwater (Republican-Arizona) also faulted Congress:

> Far from being the innocent dupes of a conspiring executive, Congress has been wholly involved in the policy decisions concerning Vietnam during the entire span of the American commitment there.[50]

Many supporters of executive war powers point to Congress's continued fiscal support of military operations in Vietnam as legitimate Congressional concurrence for the President's actions. This idea found legal support in *Massachusetts* v. *Laird*, *Orlando* v. *Laird* and *Berk* v. *Laird*. Within the context of these legal opinions and the above comments by Senators Javits and Goldwater, this seems quite logical. Such so that it would continually resurface in political debates where one would try to define the other's support for or against a military action based on an appropriations vote. This is flawed logic, though, and strikes at the heart of the politicization of this debate. Disregarding, even, the potential economic impact on an individual Congressional district, the continued Congressional resourcing of a United States serviceperson that has been

[49] Javits, 261.

[50] Lehman, 81.

entered into hostilities does not equal authorization for the continuance of those hostilities. This belief is supported in the 1973 case of *Mitchell* v. *Laird*. Authored in his opinion of the case, Judge Charles Wyzanski, Jr. offered:

> A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting... We should not construe votes cast in pity and piety as though they were votes freely given to express consent.[51]

Although certainly the most significant legislation, fore or hence, addressing war powers, the War Powers Act did little more than provide merely another point of departure, this one being much more politicized, for this enduring debate. Brought about by the actions of the five previous Presidents and their administrations, its pursuit of legitimization would come from that of the next five Presidents.

[51] Mitchell v. Laird, 488 F.2d 611 (1973).

Forward From the War Powers Act

In May 1975, the United States merchant ship *SS Mayaguez* was seized by Cambodian forces, and the American crew was taken hostage. President Ford, without consultation with Congress, directed a raid on the suspected hostage-site to rescue the crew and air-strikes against Cambodia. The crew was eventually released, but not before execution of the President's direction. The objective of the raid, Koh Tang Island, was found not to contain the hostages and cost the lives of 18 United States Marines, and the air-strikes were conducted as the crew was being released. President Ford did notify Congress, in accordance with the War Powers Act, of his actions. This notification, though, came at the conclusion of the operation. Congressional discontentment was immediate and the circumstances were set for the next round of the war powers debate. The safe return of the crew, however, ambiguity in the timing of the operation and the actual causes and effects of it facilitated overwhelming public support for the operation. Prevailing to this sentiment, the members of Congress quickly stifled their displeasure and joined in the celebration.[52] The precedent set, the war powers debate would now ebb and flow with the popularity of the military action, not its Constitutional basis.

[52] Lehman, 99.

In April 1980, President Carter directed military action to rescue American hostages in Iran. This operation, DESERT ONE, was subsequently aborted midway through the operation following an aircraft crash, which cost the lives of eight servicemen. President Carter did not consult with or notify Congress prior to this operation. Days before the operation, the President's legal counsel, Lloyd Cutler, was asked to advise on whether the operation was subject to the War Powers Act. He concluded that "because this was a rescue mission it did not require prior consultation with Congress. The mission would [be] compromised if the element of surprise was lost."[53]

As with Mayaguez five years earlier, this created immediate consternation within Congress. Unlike Mayaguez, though, its failure ensured the war powers debate was not muted. In response to his absent consultation, President Carter affirmed that his intention was to notify Congress following the operation's commencement at a time that would not compromise its security.[54] Through this President Carter maintained that he had acted within his authority as Commander in Chief and had in fact notified Congress in accordance with the War Powers Act.

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[53] Lloyd N. Cutler, "A Conversation with Lloyd N. Cutler." Interview by the District of Columbia Bar in Bar Report, October/November 1997 <http://www.dcbar.org/for_ lawyers/resources/legends_in_ the_law/ cutler.cfm> (2 January 2005).

[54] Lehman, 100-101.

President Carter's view echoed that of his predecessors: the Executive is *the* decision-maker with regards to military action. The War Powers Act, then, in function is little more than a requirement for formal notification, which the President would do anyway. Further, the 60-day period has come to be interpreted to give the President open authority to conduct military operations of limited scope and duration, exclusive of Congressional prerogatives. This was illustrated with the United States' 1983 military action in Grenada. Following a coup in that country, President Reagan directed Operation URGENT FURY to rescue American citizens and restore order. Congressional notification was made after the President had issued the execute order, and it stated justification lay with the President's authority as Commander in Chief.

As had become customary, Congressional leaders disapproved of the President's failed consultation. The operation was successful and public support for the operation was strong. Coming only two days after the bombing death of 241 Marines in Beirut, the Nation welcomed some good news. As with Mayaguez, Congressional discontent was hushed. Congress did though, pursuant to the War Powers Act, introduce legislation to end the operation within 60 days. Although a resolution passed in the House of Representatives, the Senate suspended its legislation after President Reagan indicated his intent to withdraw from

Grenada within the 60-day time period.[55] In this case Presidential prerogative not only prevailed, but interdicted the Congressional process, as well.

Following the August 1990 Iraq invasion of Kuwait, President Bush directed deployments to the region in defense of Saudi Arabia, and in accordance with the War Powers Act, notified Congress. In the notification, President Bush cited his authority as Commander in Chief and "constitutional authority to conduct our foreign relations...," and used very precise language, in clear deference to the War Powers Act, in describing the mission as "defensive" and affirming his disbelief that "involvement in hostilities [was] imminent."[56] The Constitutional debate over war powers inevitably surfaced two months later when, during an 8 November news conference, President Bush announced that he had "directed the Secretary of Defense to increase the size of U.S. forces committed to DESERT SHIELD to ensure that the coalition [had] an adequate offensive military option..."[57] The debate was furthered three weeks later when, on the appeal of the President, the United Nations

[55] Fisher, 142.

[56] George H. W. Bush, President of the United States, "Letter to Congressional Leaders on the Deployment of United States Armed Forces to Saudi Arabia and the Middle East," 9 August 1990, <http://bushlibrary.tamu.edu/research/papers/1990/90080901.html> (2 January 2005).

[57] George H. W. Bush, President of the United States, News Conference 65 at White House Briefing Room, Washington, D.C., November 8, 1990, <http://bushlibrary.tamu.edu/research/papers/1990/90110803.html> (2 January 2005).

Security Council adopted Resolution 678 which authorized "all necessary means... to restore international peace and security in the area" if Iraq failed to withdraw by 15 January 1991.[58] Within the month of November 1990, the President had changed the mission with the introduction of the offensive option and obtained authorization to do so from the United Nations, while Congress, as a whole, sat on the sidelines. A relatively small percentage of its members did pursue an injunction of the President's offensive actions in *Dellums* v. *Bush*. The Court denied the injunction, however, on the basis that Congress, as an entity, had yet to exhaust all measures inherent in its Constitutional authority, and that the President had yet to commit to an offensive course of action to enjoin.[59] In *Dellums* v. *Bush*, the Court upheld the opinion of "ripeness" as expressed in *Goldwater* v. *Carter*.[60]

This certainly put Congress in an interesting position. Until the President commits to a hostile course of action, not defined in *Dellums* v. *Bush*, but logically construed as the initiation of hostilities, Congress has no opportunity for recourse through the courts. Essentially, only after the

[58] United Nations, United Nations Security Council Resolution 678 (1990), <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/28/IMG/NR057528.pdf?OpenElement> (2 January 2005).

[59] Dellums v. Bush, 752 F. Supp. 1141 (1990).

[60] Goldwater v. Carter, 444 U.S. 996 (1979).

commencement of hostilities, could Congress pursue an injunction. Nevertheless, this entire line of reasoning should be considered moot because Congress, as an entity, already possesses the inherent Constitutional power to enjoin in these instances.

Congress did have a final opportunity, however, if it desired, to disrupt President Bush's actions in the Persian Gulf. In early January 1991, the President requested a Congressional resolution "stating that Congress supports the use of all necessary means to implement [United Nations] Security Council Resolution 678."[61] Faced with strong public support for the President's actions and not wishing to surrender the initiative to Saddam Hussein through American dissention, Congress passed a resolution granting the President authority to use military force in support of the United Nations Security Council Resolution.[62] During Desert Shield and Desert Storm, the President once again, through shrewd political maneuvering, introduced United States Armed Forces into hostilities wholly on his own privilege and completely absent of the true inter-branch consultation Congress sought in the War Powers Act.

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[61] George H. W. Bush, President of the United States, "Letter to Congressional Leaders on the Persian Gulf Crisis," 8 January 1991, <http://bushlibrary.tamu.edu/research/papers/1991/91010801.html> (2 January 2005).

[62] U.S. Congress. Joint, Authorization for Use of Military Force Against Iraq Resolution, 102nd Cong., 1st sess., 1991. H.J. Res. 77.

On 26 March 1999, President Clinton notified Congress that he had directed on 24 March 1999, air-strikes against the Federal Republic of Yugoslavia in response to its continued violence against the Albanian population in Kosovo.[63] Interestingly, the Senate, on 23 March 1999, had passed a concurrent resolution authorizing the President to conduct military air operations and air strikes in Yugoslavia.[64] Although passed with the House of Representative's concurrence, the bill was not binding legislation. The following month, Congress pursued binding legislation, but failed to come to collective agreement. In order to cease the President's actions, selected members of the House, led by Congressman Tom Campbell (Republican-California), filed suit requiring the President to obtain Congressional authorization for the continuation of hostilities in Yugoslavia. In *Campbell* v. *Clinton*, the United States Court of Appeals for the District of Columbia upheld a lower court ruling against the plaintiffs on the basis they lacked the legal standing to pursue the case.[65]

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[63] William J. Clinton, President of the United States, "Presidential Letter to Congress on Kosovo," 26 March 1999, <http://www.clintonpresidentialcenter.org/legacy/032699-presidential-letter-to-congress-on-kosovo.htm> (2 January 2005).

[64] U.S. Congress. Senate, A concurrent resolution authorizing the President of the United States to conduct military air operations and missile strikes against the Federal Republic of Yugoslavia (Serbia and Montenegro), 106th Cong., 1st sess., 1999. S.Con. Res. 21.

[65] Campbell v. Clinton, 203 F.3d 19(D.C. Cir.2000).

Again, the President's prerogatives reined in the war powers debate.

As evidenced by its executive non-adherence, the War Powers Act did little to recover to Congress the war powers it collectively felt it had lost during the 1950s, 60s and early 70s. Congress had proven itself slow to act, overly susceptible to public opinion and incapable of reaching the collective agreement required to validate its own war powers. This last point was clearly demonstrated when, in 1994, President Clinton pledged support for legislation that would amend the War Powers Act to include a mandated consultative mechanism, and Congress was unable to produce a bill.[66] Congress was equally unsuccessful in obtaining help from the courts, which consistently exercised judicial restraint and declined to provide ruling on executive-legislative political disputes.

[66] William J. Clinton, President of the United States. "Clinton Administration Policy on Reforming Multilateral Peace Operations," Presidential Decision Directive, 3 May 1994, < http://clinton4.nara.gov /WH/EOP/NSC/html/documents/NSCDoc1.html> (2 January 2005).

War Powers in the Global War on Terror

At about 0945R on the morning of 11 September 2001, in a telephone conversation with the Vice President of the United States concerning the events of that morning, President Bush made a statement that would prove to underscore his interpretation of Constitutional war powers: "Sounds like we have a minor war going on here, I heard about the Pentagon. We're at war... somebody's going to pay."[67] The first airplane had crashed into the World Trade Center only about one hour prior, yet the President had already decided to pursue hostilities against the attackers. Certainly, the President's official position within the context of this debate should not be construed from the above quote, but it is illustrative, nonetheless, of where President Bush stands on this issue. Furthermore, his actions over the following 18 months were consistent with that of his ten immediate post-World War II predecessors, each of which held supreme the executive prerogative in making war. In somewhat of a departure from then recent historical precedent, Congress, absent a formal

[67] National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States, (New York: W.W. Norton and Company, 2004), 39.

Presidential request[68], passed legislation that authorized the President:

> to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons *in order to prevent* any future acts of international terrorism against the United States by such nations, organizations or persons.[69]

In sweeping language, Congress had authorized the President broad authority, which could be interpreted to include preventative preemption, to respond to the terrorist attacks. President Bush, upon signing the bill into law, although acknowledging meaningful consultation with members of Congress, took the opportunity to affirm his position on executive war powers: "In signing this resolution, I maintain the longstanding position of the executive branch regarding the President's constitutional authority to use force..."[70] Six days later President Bush notified Congress that he had: "In response to these attacks... ordered the deployment of various combat-

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[68] President Bush, on 12 September 2001, had requested in a letter to Congress emergency appropriations to address the terrorist attacks, but the letter did not address specific plans for the United States Armed Forces. For full text of the letter see: Bush, George W., President of the United States, Letter from the President to the Speaker of the House of Representatives, 12 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010913-6.html> (3 January 2005).

[69] U.S. Congress. Joint, Authorization for Use of Military Force, 107th Cong., 1st sess., 2001, S.J. Res. 23 (emphasis added).

[70] Bush, George W., President of the United States, Statement by the President upon signing into law S.J. Res. 23, 18 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html> (3 January 2005).

equipped and combat support forces to a number of foreign nations..."[71] This letter, too, referenced interaction with Congress. Unlike the previous reference to Presidential consultation with Congress, however, this reference was to that of communication with members of Congress. This reference of communication vice consultation was again contained in the President's notification to Congress of the commencement of combat operations in Afghanistan.[72] Granted that this may be simply an exercise in semantics, the question of executive versus legislative war powers did, in fact, surface in President Bush's Administration during this time. In response to a query from the White House Counsel's office on the scope of the President's authority to take military action in response to the terrorist attacks, Deputy Assistant Attorney General John Yoo provided in the conclusion of his memorandum opinion:

> In both the War Powers Resolution and the Joint Resolution, Congress has recognized the President's authority to use force in circumstances such as those created by the September 11 incidents. Neither statute, however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the

[71] Bush, George W., President of the United States, Letter to Congress on American Campaign Against Terrorism, 24 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010924-17.html> (3 January 2005).

[72] Bush, George W., President of the United States, Presidential Letter to the Speaker of the House and President Pro Tempore of the Senate, 9 October 2001, <http://www.whitehouse.gov/news/releases/2001/10/20011009-6.html> (3 January 2005).

> response. These decisions, under our Constitution, are for the President alone to make.[73]

The spirit of this opinion would surface a year later in the President's National Security Strategy, in which he introduced the doctrine of preemption.[74] The United States' next significant military action, its involvement in Iraq, provided an opportunity to exercise this strategy and further define President Bush's position on executive war powers.

With the passage of House Joint Resolution 114, Congress authorized the President:

> To use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.[75]

Again, despite the broad authorization provided in the resolution, President Bush reiterated his position on executive war powers during the 16 October 2002 signing of the bill into law:

> While I appreciate receiving that support, my request for it did not, and my signing this resolution does not,

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[73] Yoo, John C., Deputy Assistant Attorney General, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," Memorandum Opinion for the Deputy Counsel to the President, 25 September 2001, <http://www.usdoj.gov/olc/warpowers925.htm> (2 January 2005).

[74] U.S. President, The National Security Strategy of the United States of America, 17 September 2002.

[75] U.S. Congress. Joint, Authorization for Use of Military Force Against Iraq Resolution of 2002, 107th Cong., 2nd sess., 2002, H.J. Res. 114.

> constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers resolution.[76]

References to consultations with Congress were made in this statement, as well as in the President's eventual letter notifying Congress of the commencement of combat operations in Iraq, wherein President Bush stated he looked forward to continued consultation and cooperation with Congress.[77] This does not provide evidence, though, that the decision to enter into hostilities was a collective one, despite the alluded to Congressional participation. Rather, likened to that of President Eisenhower almost five decades earlier, it provides evidence of the political astuteness of the President and his understanding of the issue of war powers. Yet, again, United States Armed Forces had been entered into hostilities on the executive prerogative of the President.

[76] Bush, George W., President of the United States. Statement by the President upon signing into law H.J. Res. 114, 16 October 2002, <http://www.whitehouse.gov/news/releases/2002/10/20021016-11.html> (3 January 2005).

[77] Bush, George W., President of the United States. Presidential Letter to the Speaker of the House and President Pro Tempore of the Senate, 21 March 2003, <http://www.whitehouse.gov/news/releases/2003/03/20030321-5.html> (3 January 2005).

Conclusion

The eleven post-World War II Presidents have each entered United States Armed Forces into hostilities, all without a Congressional declaration of war. In doing so they have sustained the debate over where resides the Constitutional authority to make war. This debate was initially based on varying interpretations of the Framers' original intent, and these interpretations were that of the supremacy of the executive, the supremacy of the legislature or the collective judgment of both in making war. However, the debate evolved to include the implication of United States participation in mutual security arrangements, such as the United Nations and the North Atlantic Treaty Organization, and the success and resultant popularity of the military action in question. It also involved the impact of Congressional legislation, first in the form of amendments to appropriations bills and later with the War Powers Act of 1973. In each instance though, the debate was not ultimately defined by the interpretations of the Framers' original intent or by the implications listed above. Rather, it was defined by the President's functional execution of war powers. Each time that United States Armed Forces were introduced into hostilities, whether it was with Congress' tacit approval, in direct contravention to it or exclusive of its full knowledge, the Presidents all maintained their executive

prerogative. As such, they defined through function that the decision to introduce United States Armed Forces into hostilities rests solely with the President, regardless of individual interpretations of the Framers' original intent.

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